UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	September 8, 2016
	Minneapolis, Minnesota
	Courtroom 12W
	1:37 p.m.

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

And THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(HEARING ON CUSTODIAN DISCOVERY DISPUTE)

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P R O C E E D I N G S

(1:37 p.m.)

THE COURT: Good afternoon. Please be seated. Judge Noel will be talking to you primarily on the discovery issues. That's no surprise.

MAGISTRATE JUDGE NOEL: Okay. Shall I just go?

THE COURT: Go ahead.

MAGISTRATE JUDGE NOEL: Good afternoon. Welcome.

We're here for some argument on the issue of whether the defendants have or have not done all they need to with regard to identifying custodians for the purpose of responding to discovery. So let's start with who is speaking for whom? Who is on the plaintiff's side? Ms. Zimmerman, let's start with you.

MS. ZIMMERMAN: Thank you, Your Honor. Genevieve Zimmerman for the plaintiffs.

May it please the Court, there were three issues that were presented to the Court, and the Court assisted us in framing. And those three questions were:

First, whether the defendant's process was consistent with the regulations or the requirements under the federal rules.

Second, if not, what more needs to be done to identify the custodians?

And then, third, regardless of what process the

defendants have used to identify the custodians, whether they have in fact fully met their obligations under the federal rules.

Respectfully, I think that from a plaintiff's perspective, the answers to the first and third are no. Regardless of the process, the defendants have not met their burden under the Federal Rules of Civil Procedure. And I'll take the Court briefly through that from a legal perspective, and then my co-counsel, Mr. Parekh, will deal with the technical aspects about the answer to the second question, what more needs to be done.

THE COURT: Okay. Let me just, for whatever it's worth observe that to me that second question in light of your response to one and three is the most important question. So what is it we're supposed to do? But I don't want to cut you off.

MS. ZIMMERMAN: Certainly. Mr. Parekh could certainly come up and address some of the technical aspects of what has happened already, and why we think that there is a deficiency in what has been done by the defendants thus far. That would be helpful to jump to those questions.

THE COURT: I understand. The more important question is not why you think they haven't fulfilled their obligation, but what do they need to do going forward now to do that? What more should we -- what is it you want us to

order them to do that they haven't done? Is that him or is that you?

MS. ZIMMERMAN: I think that it may be Mr. Parekh. To segueway there --

THE COURT: But I don't want to cut you off, so go ahead.

MS. ZIMMERMAN: Sure, thank you. We identified in our papers at least eight different custodians and provided some examples of documents that support our belief that the defendant's identification of both custodians and documents are insufficient under the Federal Rules of Civil Procedure.

The examples that we provide demonstrate just by brief way of example different documents that should have been identified and custodians that should have been identified on filtration issues, on design issues, on contamination issues, on whether or not to conduct a hazard team analysis, about the kinds of complaints that they were receiving from the field from various customers, and the certain kinds of complaints that they saw in hearing back from the hospitals across the country.

So I think that probably with those specific examples in mind and those documents attached to the Court's reference, I'll have Mr. Parekh come up and talk about what more we should do going forward to ensure that a robust and complete production is made by the defendants.

MAGISTRATE JUDGE NOEL: Okay.

MR. PAREKH: Good afternoon, Your Honors, Behram Parekh on behalf of plaintiffs.

To get to the point of saying what more they should do, we need to at least look very briefly at what they have done. And the key items that come through from what they have done is that they have limited their interviews to approximately 25 custodians given the fact that plaintiffs identified 39 custodians of which they said 24 they have responsive documents for and the rest of them they don't.

We're not sure what the overlap is between the 24 and the 25 that they interviewed, but my guess is they're pretty much the same people. And so there doesn't appear to have been anything the defendants did above and beyond the people that plaintiff identified in order to determine whether or not there were additional individuals for whom custodial documents existed that were responsive to the RFPs, and that is an obligation that defendants have in the first instance not plaintiffs.

So the first thing that we would ask that the Court order defendants to do is to do a thorough investigation of individuals at 3M including interviews to determine what additional people do exist that may have responsive documents to the RFPs. So that's number one.

Number two is they need to actually look for sources of documents that contain information that may have been sent to or received from at least the 24 custodians and the 39 custodians that the plaintiffs have identified outside of just the individual e-mail box for that particular custodian.

The eleven custodians that defendants say they have no e-mails for, they don't say they actually don't have any e-mails for them. They say they don't have a specific e-mail box that was their e-mail box. But they do have this e-mail server that has lots of e-mails of lots of other custodians. They have chosen not to look through those e-mails and just even do a cursory look to see whether or not e-mails from or to that person exists that plaintiffs identified in their list of 39.

So at the very least, they need to go back and look for those e-mails. But what we would actually suggest is that they need to do a search of the entire e-mail server and look for responsive documents regardless of custodians, because of the fact that there are so many custodians who plaintiffs have identified who they claim they don't have e-mails for. So that is number two.

Number three, they have to make clear to plaintiffs what it is that they've actually done so that when we run across e-mails or we run across certain items,

we can go, oh, okay, we likely believe that additional e-mails of this type or additional documents of this type will still be coming on a going-forward basis.

And defendants do a lot of talking about how many documents they've produced and how many millions of pages and things like that, but when it comes down to it, they actually have not produced very much in terms of actual individual e-mails and documents and things where the information would exist.

Out of the 1.3 million odd pages that they produced, over 500,000 of those pages come from just a little under 500 documents, and these documents consist of thousands and thousands of pages of Excel files with streams of data that really are meaningless in terms of the page count.

The fact that you have, you know, a 2,000 page or a 10,000 page in one instance, Excel file that has data that was produced from a computer during testing does not mean that it's 10,000 pages of relevant information.

The other thing that they have is about 35,000 of the 90 or so thousand documents that they produced so far are simply either studies that were generated in the public domain and kept by 3M or testing data on things like how

much heat does the Bair Hugger generate, how much air flow does it generate, what's the volume, testing on different types of motors that they use? Well, all of that data may be interesting, none of it really goes to the heart of the case. None of it really talks about whether or not they looked for contaminants or whether they look for whether or not contaminants were blowing.

If negative data, plaintiffs need that data in order to show, look, you did, you know, 3,000 tests and not a single one of them look for contaminants, but the fact that they produced it doesn't mean that it's actually stuff that's useful to us.

So when you actually come down to it, there's not a whole lot of stuff that they've produced today that really consists of substantive information about what it is they did and didn't do that advance and actually respond to plaintiff's RFPs. And so what we need for defendants to do is identify as we put in our papers what exactly they have looked at and what else is out there.

Another example of what they haven't done is there are archived tapes that exist at Iron Mountain, and defendants didn't identify those archived tapes until a meet and confer that was about a month or so ago. So we ask for more information about the archived tapes. And we asked will you look at them? Will you figure out what is on them

or at least tell us what they are? We only got that data today. And their position currently is if you want to do anything with the archived tapes, you have to pay for it. You have to pay for attorneys to review anything that comes out of the archived tapes, and you have to pay for the production of that.

And while we're okay with sharing costs in terms of the actual, you know, taking the tape and making it accessible, there's nothing that says that we should be paying for attorney review of that data. I mean it just doesn't make any sense. If they want to review it, great, they can review it. If they don't want to review it, they don't have to review it. They can just produce it to us wholesale. We'll take it.

But it's that kind of thing where they won't even tell us, you know, they're not even taking that first step to say, okay, here we have these tapes. We don't know what's on them other than, you know, certain labels but, you know, we're willing to take a look and see what's actually on the tapes. Some of those tapes are labelled things like "potential e-mails." And given the fact that they claim we have no e-mails from 11 of these custodians, perhaps some of those e-mails are on those tapes. We don't know.

But it's those kinds of things where we're concerned that they're not taking their obligations to

respond to our discovery and doing it affirmatively unless we find out about it and call them on it, and that in a nutshell is what we want defendants to do.

THE COURT: So let me ask you this question: Throughout the defendant's memo, they keep referring to this what they call an agreement on the 25 or 24 custodians and that the plaintiffs have reneged on the agreement. Was there an agreement? And why did the defendants think there was if there wasn't?

MR. PAREKH: Respectfully, Your Honor, I don't believe that there was an agreement, and I was the primary attorney involved in talking to Mr. Hulse about the custodians' issue. What we said was we think it's your obligation to identify custodians, but in order to get the process moving, here's the 39 that we've identified in our Rule 26 disclosure. You've only identified five. We think you need to identify more. And they said, well, we think your 39 is good, but we have this time crunch. And so we said, okay, fine, let's start with the 39, which you and I both agree to are at least at the bare minimum people that you're willing to search.

We never said they don't have to go out and search more. In fact, we always maintained the position that it was their obligation in the first instance to identify custodians, but we have a short time schedule. We needed to

get the process moving. And so that was the agreement. The agreement was this is the initial list. Let's get started with this. Let's get documents being produced, so that we can at least -- we need time to review the documents before we can take depositions, so at least we get this stuff out of the way.

It was never an agreement or even an acknowledgement that they did not have a burden in the first instance to identify the relevant custodians and produce documents.

THE COURT: Let me ask this question then:

So as I understand the defendant's memo, also they say by whatever method we got here, whether it's overly reliant on the plaintiff to identify people or whatever, we've covered the waterfront now. We've got finance. We've got R&D. We've got marketing. We've got sales. Whatever the different categories of departments within 3M and Arizant. We've got the representative people from each of those departments. Do you have a sense that they don't?

MR. PAREKH: I think the e-mails that we identified and the documents we identified attached to our memo are examples of why we think they don't. Is those memos or those e-mails, some of them were just forwarded to one of the custodians that we've identified. Other ones, you know, they were cc'd on somewhere. And some of them, if

you look further down the chain, those custodians don't exist. They weren't on the initial chain of e-mails. They only ended up with, you know, the e-mail in their memo because somebody decided to forward it to them.

So other than by happenstance of that particular e-mail being forwarded or cc'd, we would have never seen that e-mail. And so that's why we do believe that there are people out there who 3M should know and should be able to find through interviews and a real process of going through and finding answers that they have missed and that we only find out by happenstance exists.

MAGISTRATE JUDGE NOEL: Okay. Thank you.

Ms. Zimmerman, I'm feeling really bad that I cut you off because you had prepared so well. Is there something else you want to say to add before I go to defendants?

MS. ZIMMERMAN: Not at this time, Your Honor. Thank you though.

MAGISTRATE JUDGE NOEL: Mr. Hulse?

MR. HULSE: Your Honors, if I may, and thank you for the time on this issue, I'd like to start just briefly on the agreement and then proceed to what plaintiffs are asking to be done here. Also, their characterization of our review, which frankly just indicates to me with due respect that they haven't really reviewed our documents and what

we've produced.

So the agreement they don't deny that it existed. It's documented. We mentioned the --

THE COURT: They did deny it existed. I asked him, and he said there wasn't an agreement. The agreement to the extent there is an agreement, it's a floor not a ceiling. If this is the minimum, because so we can get started, but they never agreed this is the universe. And as I read your memo, your vision is that this is the universe of custodians.

MR. HULSE: Well, it was certainly an open-ended agreement, and we made clear from the beginning that we understood that as they review, they started with a hundred thousand pages of our documents and 20 depositions. And as they went forward, they could identify additional custodians for us, which is something that they went despite our production for months before they identified any more. When they did identify two more, we agreed to that. This list that's in the submission, that was never a list that they gave us.

And what's interesting, by the way, is seven of eight of the documents that they point to and sent to the Court are documents that were produced in the Walton and Johnson case and certain of plaintiffs executive committee have had for over a year and sometimes two years. And

they've certainly been available to all of plaintiff's counsel for a year. That's seven of eight.

The last one was simply a meeting invite that we produced back in July. But none of the rest of the documents that they brought to the Court's attention are from our more recent production. So those are all e-mails they had absolutely the capability if they thought that there was a deficiency in custodians to identify to us during this process that we contemplated. And we didn't hear from them that they no longer saw this process as sufficient until this August meet and confer, which was the day that they -- the day before the Court's hearing.

And the reason why this agreement was so essential is because they had 230 document requests. And if you sum all of those 230 up together, it's essentially all documents related to Bair Hugger and forced air warming for a 25 year period. That's what they sum up to. We had, of course, breadth, burden, and relevance objections to nearly every single one of those because each one was written very expansively. Obviously, we could have become bogged down interminably in those 230 issues.

But what we saw that we could do, and Mr. Parekh and Ms. Zimmerman, who were my counterparts in this negotiation, saw that we could do is we could get past those issues if we had agreement on custodians. If we had a world

of custodians that we could focus on, then we could produce much more expansively and not have to bring these issues about breadth and burden to Your Honors. That was foundational.

If we had not had that agreement on custodians, we would have spent the last two months in telephone conferences and Court conferences dealing with those 230 issues. And I think that --

MAGISTRATE JUDGE NOEL: Where do we find in the record this agreement that the plaintiffs agreed to what you think you agreed to?

MR. HULSE: And, Your Honors, by the way, there are a couple of places. One is in the submission to Your Honor, Judge Noel, that we made for our first discovery conference. It's referenced in our position statement with no rebuttal from the plaintiffs, and there was never a dispute when we had that status conference that it existed.

It's reflected in Ms. Zimmerman's e-mail, which is quoted, where she says they reserve the right based on our document production to identify additional custodians. It is also in my work product notes from our meet and confer clearly reflected, which I'm happy to offer Your Honors for in camera inspection if there really is an inspection about the existence of this agreement.

So we operated, and they knew that we were

operating for several months under this agreement, and it was a good agreement, and it was an agreement that worked. And the proof of it is again that the eight documents that were shared with Your Honor not only were documents they've had a long time, but each and every one of those documents had at least two and in some cases three or four of our custodians on it.

So for each one, we were catching the documents in an e-mail sent by a non-custodian, two, three, four other ways, and that's just the ones they provided. There will be many others where we will have ten of our custodians copied on it.

And we also provided the plaintiffs, and there's certainly a group that were on their initial disclosures, people who left Arizant, the predecessor company, back in 2005, 2004, who we don't have e-mail archives for.

However, the plaintiffs have through the production of people who continued as Arizant employees and then 3M employees, thousands upon thousands of e-mails that were sent by those individuals. And we provided to the plaintiffs a listing for each of those individuals of the number, thousands of e-mails, thousands of e-mails for each of those individuals who we did not have document repositories for.

And another point, they've got their list of 16

custodians who they say should be added as custodians. So, of course, we saw that in their submission, of course, we took a look at that. Several of those individuals we don't have e-mail for, some we do.

But what we did is we looked in our document database, and we said, okay, how many e-mails do we have from each of those individuals to, from, received? Some are an existing group of custodians. And in all cases but one, it's thousands and as high as 25,000 e-mails to, from a non-custodian. In the one case where it's a smaller number, it's a guy who moonlighted on the Bair Hugger project for about a month in 2015.

So what the custodians have done here is they have really covered the waterfront. And plaintiff's submissions and these e-mails that they offered Your Honors only confirm the sufficiency of it. And so, and that's what's after all of the argument back in chambers about this is frustrating to us, because when it came to actually showing a deficiency, all they showed is that this group of custodians worked and that it was sufficient. And they know that it was the foundation of not having to belabor and waste Your Honor's time with a whole bunch of other discovery disputes.

MAGISTRATE JUDGE NOEL: So let me ask this question:

As I read your memo, and I'm particularly looking

at the heading "C," under the relevant background where you described 3M's own investigation of validated the agreed list of custodians, of the things that you list there, it appears to me that most of them of the four things, the one that sounds most like an independent thing you did on your own as opposed to just checking what plaintiffs have given you is number two, where you say, "3M conducted 25 custodian interviews."

Are those the custodian interviews you conducted of the, include the 24 folks that plaintiffs have identified or that you came to what you're calling the agreement on?

MR. HULSE: Yes and no. And I want to clarify that many, in fact, the majority of those custodial interviews actually predate the agreement. So we went in to the meet and confer knowing from the custodial interviews that we had conducted that plaintiffs actually, and no surprise, I mean some of them have been litigating this for two years and had our documents and 20 deposition, they done a good job of figuring out who the custodians should be.

And so what we did, and I want to be clear too that 3M has a formal process for multi-hour document collection interviews. Okay. And we've done 25. It's actually now a little higher than that of those. They are, some were custodials --

MAGISTRATE JUDGE NOEL: Let me make sure I'm

clear on --

MR. HULSE: I'm sorry, I didn't answer your question, Your Honor --

MAGISTRATE JUDGE NOEL: No, just on that point though, so this process, this multi-hour thing is like a standard operating procedure that --

MR. HULSE: It is indeed.

MAGISTRATE JUDGE NOEL: -- 3M legal goes through whenever it gets sued in a major case.

MR. HULSE: It is, Your Honor, yes.

MAGISTRATE JUDGE NOEL: And you did that for these 25 people?

MR. HULSE: Some of them are former employees who ewe just happen to have documents for. So we did it for some formers. Mostly, they were current, okay, but they helped lead us to the right group. Some people we interviewed and they clearly weren't the right person. Or they had a subset of documents that we then made targeted collections of.

One thing that plaintiffs didn't mention is we actually have in addition to the 26 now agreed custodians, we have 30 other sources of documents. Most of which are custodial that we have done targeted collections for. Most people, I mean there are hundreds and hundreds of people who have touched some aspect of the Bair Hugger forced air

warming over the course of the last 25 years, but many of them have only an incidental role. That doesn't make them a all purpose custodian that we go and collect and review all of their documents for. It means we know they have a specific thing. They've got this document or work charts, whatever it is, and so we consider them a special purpose custodian, go collect from them. We have 30 of those --

MAGISTRATE JUDGE NOEL: That's what you're calling or they're describing in their memo as what you've described as a limited custodian?

MR. HULSE: Yes, exactly. Exactly.

MAGISTRATE JUDGE NOEL: So if we were to ask you to identify by name, title, and job description who these 25 are, is that something that can be done fairly readily?

MR. HULSE: It is. It can be done fairly readily, and that's in addition to, I mean we consider all of this, of course, to be work product and prefer not to wreck privilege on it, but whatever Your Honors require you require.

And in addition to that, we have, I mean I personally can say I've conducted many, many, many custodian-type interviews or employee interviews that don't fall under that formal multi-hour process in order to identify documents. I mean I speak to this personally because I did it.

And so it's, but what we again don't have here, Your Honors, is a demonstration that this comprehensive, robust production is in fact deficient. And I want to say that I have been, and my colleagues have been extremely transparent through the process. We have answered dozens and dozens and dozens of e-mails inquiring if we're, you know, some litigants would say now send me an interrogatory. We answer them informally all the time. We answer them in phone calls. We have tried to answer everything they have asked.

MAGISTRATE JUDGE NOEL: Right, but I guess where they are coming from and to some degree me, it appears to me that you've been overly reliant on them to show where you're deficient. In other words, as I understand it, you came up with five or less custodians, and they said, wait a minute, there are at least 39. And then you had this meet and confer process, and you came to what you're now calling an agreement on 24. And so how could you start with only five?

MR. HULSE: Well, with respect, the initial disclosures, I mean we all know what initial disclosures are, right? They require you to disclose the people who you may rely upon for the defense of your claims or in support -- defense of claims or support. It's not list all custodians. Okay. And so what we were required to do under PTO4 was make initial disclosures on the issue of general

causation, and we have always been explicit about including in our initial disclosures about what we understood general causation to mean. It's a science issue. It's whether the Bair Hugger system is capable of causing surgical site infections, the type of infections that plaintiffs are alleging, and whether there's a methodology for ruling out other causes that we know to be possibilities. That's a science issue. And so we see that general causation as an expert issue fundamentally, one that will be resolved by experts.

But we said, okay, well, if we need fact witnesses to authenticate our testing documents, R&D documents, regulatory documents, which are the only kind of documents upon which a scientific expert could rely. They're not going to rely on e-mails. Then who are those people? And those are the five we listed.

They never served us with an interrogatory or to identify every possible custodian. They never did, and essentially they may regret that. They've actually now served it in the last couple of days, that interrogatory that I suppose they wished they had served. But they didn't serve it, and they are essentially now asking the Court to just to order us to answer that interrogatory immediately.

But it's -- let me I want to make sure I answered your question, Your Honor. But that explains the initial

disclosures.

MAGISTRATE JUDGE NOEL: Okay.

MR. HULSE: Okay. However, I want to be clear that this validation did not happen exclusively after the fact, that we knew from the prior litigation and then also from the preparation and internal diligence that we did leading up to the receipt of the plaintiff's discovery who the appropriate custodians were. And when we got plaintiff's list, it was, again, perhaps partially by coincidence a good list, but I don't think it's coincidence because they knew the case and have been litigating it.

However, there are also people that we knew, and we had already collected from or continue to collect from documents on a limited basis. So it was not purely a let's see list and then we'll figure out if that looks okay. It's not that at all. Most of the work was done before we ever got their initial disclosures.

And I'll say the process could have worked. And in fact, this list that plaintiffs gave us is a list that if it had come in a meet and confer instead of a court submission could have been the foundation for a resolution. But it either was a decision for whatever reason to repudiate the process that we had agreed to that we sat there in that room and agreed to on this.

I also want to be clear about our production, our

document production. Again, this is a science case. We all know it's a science case. And Mr. Parekh may run down the fact that we have produced reams of testing data, data that they requested, but that is precisely the most important information in the case. Research and development, regulatory and testing is the documents that the experts are going to look at.

This case is not going to be made one way or the other by that extra, that millionth e-mail that gets produced. And I want to be clear that we have produced 400,000 pages of e-mails and attachments at this point. And the representations in their submissions that we have not produced e-mail are just wrong. They're not right. And it stands in incredible contrast to plaintiff's own approach to discovery, which is to produce very little and maintain that it's too burdensome for them to produce documents beyond those documents held by the plaintiff's executive committee. That's too burdensome.

And so this expansive approach, which is more than any court in a comparable case has ever required that you go and search and produce from anybody who can conceivably have, anybody who can conceivably have a relevant document, it's not only not supported by the law, it's a striking contrast to their own approach.

MAGISTRATE JUDGE NOEL: Okay. Thank you.

MR. HULSE: Thank you.

MAGISTRATE JUDGE NOEL: Since we had simultaneous memos, and I just chose who went first, I don't think we need rebuttal. I think I have a sense, unless you have a different view.

So with that, we'll take our break to get the folks on the phone. Or is there other stuff?

THE COURT: The people on the phone are expected to be call in at 2:30.

MAGISTRATE JUDGE NOEL: Okay. We'll be in recess until 2:30.

(Recess at 2:10 p.m.)

* * *

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR